2006

Steven McCowin v. Salt Lake City Corporation, Barry Rasmussen, Mark Hammond : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STEVEN MCCOWIN, Plaintiff/Appellant	)	APPEAL
vs.	)	
SALT LAKE CITY CORPORATION; BARRY RASMUSSEN; MARK HAMMOND, Defendants/Appellees	)	Case No. 2006[redacted]CA

BRIEF OF THE APPELLANT

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, HONORABLE JUDGE GLENN K. IWASAKI

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IN THE UTAH COURT OF APPEALS

STEVEN MCCOWIN, Plaintiff/Appellant	)	APPEAL
vs.	)	
SALT LAKE CITY CORPORATION; BARRY RASMUSSEN; MARK HAMMOND, Defendants/Appellees	)	Case No. 20061114-CA

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JURISDICTIONAL STATEMENT

This appeal is within the jurisdiction of the Utah Supreme Court pursuant to Utah Code Ann. §78-2a-3(2)(j), and was transferred to the Utah Court of Appeals pursuant to Utah Code Ann. §78-2-2(4).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Is Salt Lake City Corporation entitled to ignore its own mandatory ordinances regarding public hearing notices? That is, did the trial court err in holding that Salt Lake City Corporation may send out materially misleading hearing notices in violation its own mandatory ordinances, and that this violation does not give rise to any actionable claim on the part of citizens such as appellant Steven McCowin who was thus deprived of adequate hearing notice? The trial court dismissed pursuant to a motion to dismiss, based upon standing and due process arguments; the Court of Appeals reviews for correctness without deference to the trial court. Utah County v. Ivie, 137 P.2d 797 (Utah 2006); D.A.R. v. State of Utah, 133 P.3d 445 (Utah App. 2006); Cook v. Zions First National Bank, 57 P.3d 1084 (Utah 2002). This issue was presented to the district court and preserved for appeal. (R. at 2-4, 410-15)

DETERMINATIVE ORDINANCES

The following portions of the Zoning Ordinance of Salt Lake City are relevant to the determination of this appeal: Salt Lake City Ordinance 21A.04.020.E provides in relevant part that, "The word 'shall' is mandatory; the word 'may' is permissive." Salt Lake City Ordinance 21A.10.020 provides in relevant part that,

> Providing all of the information necessary for notice of all public hearings required under this title shall be the responsibility of the applicant . . . The historic landmark commission shall hold at least one public hearing to review,

> consider and approve, approve with conditions, or deny an application for a certificate of appropriateness for alteration, new construction or demolition of a landmark site or contributing structure(s) located in the H historic preservation overlay district. . . . Where a public hearing is required, such hearing shall be held after the following public notification: . . . Notice by first class mail shall be provided a minimum of fourteen (14) calendar days in advance of the public hearing . . . to all owners of the land . . . within eighty five feet (85') for certificates of appropriateness for alterations and three hundred feet (300') for certificates of appropriateness for new construction. . . . The notice for mailing for any public hearing required pursuant to subsections A through E of this section shall state the substance of the application and the date, time and place of the public hearing, and the place where such application may be inspected by the public. The notice shall also advise that interested parties may appear at the public hearing and be heard with respect to the application.

STATEMENT OF THE CASE

On July 27, 2006, plaintiff and appellant Steven E. McCowin ("Mr. McCowin") filed his Complaint against defendants and appellees Salt Lake City Corporation (the "City"), Barry Rasmussen and Mark Hammond ("Messrs. Rasmussen and Hammond") claiming that these defendants had violated mandatory City ordinances in the manner in which the City issued its authorization for Messrs. Rasmussen and Hammond to construct a large, two-story building catty-corner from Mr. McCowin's home in the University Historic District. (R. at 1-14) In particular, Mr. McCowin claimed that the City and Messrs. Rasmussen and Hammond had sent out a deceptive hearing notice, and that the two-story building is architecturally non-compatible with the University Historic District. (R. at 3-4)

On August 21, 2006, the City filed a Motion to Dismiss (R. at 61-7), seeking dismissal of Mr. McCowin's Complaint pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure.

On August 8, 2006, Messrs. Rasmussen and Hammond filed an Answer to the Complaint. (R. at 15-24) Subsequently, on September 29, 2006, Messrs. Rasmussen and Hammond filed a

Motion to Dismiss or, Alternatively, for Summary Judgment (R. at 359-382), seeking dismissal of the Complaint pursuant to Rule 12(b)(6) and/or Rule 56 of the Utah Rules of Civil Procedure.

The district court dismissed Mr. McCowin's Complaint on November 14, 2006. (R. at 584-86)

Mr. McCowin filed his Notice of Appeal on December 6, 2006. (R. at 587-88)

RELEVANT FACTS

1. This case involves the City's approval for the construction of a large, two-story accessory building in the University Historic District. (R. at 1)

2. In September or October of 2005, the City issued a written notice of a public hearing to be held on November 2, 2005 (the "November 2 hearing"). The hearing notice stated that the following matter would be considered at the November hearing:

> Case No. 0270-05 at 446 South Douglas Street by Barry Rasmussen and Mark Hammond, requesting to construct a new garage with access to the abutting alley. This property is located in the University Historic District.

(R at 2, 6)

3. Mr. McCowin alleged that the two-story building proposed by Messrs. Rasmussen and Hammond is substantially more than a "garage" as that term is defined in the City's Ordinances, and that the hearing notice was therefore deceptive. (R. at 2-3)

4. Mr. McCowin alleged that this deception prevented him from knowing the substance of the proposal that would be discussed at the November 2 hearing, and interfered with his right to appear at the hearing and oppose the proposed two-story building. (R. at 3-4).

5. Mr. McCowin presented evidence to the district court that the City violated other of its mandatory ordinances in the manner in which it conducted the November 2 hearing. (R. at

418-420)

6. As soon as Mr. McCowin had actual notice of the substance of the two-story building, he promptly initiated this law suit. (R. at 4)

7. Messrs. Rasmussen and Hammond refused to allow any discovery regarding the non-"garage" nature of their two-story building. (R. at 395)

8. In its Memorandum Decision dated October 30, 2006, the district court noted that it "has serious concerns regarding the adequacy of the 'notice' provided Plaintiff in this case. (R. at 551)

SUMMARY OF THE ARGUMENT

The City's mandatory Ordinance 21A.10.020 gave Mr. McCowin the right to receive a non-deceptive notice of the November 2 hearing.

Neither of the two cases upon which the district court based its dismissal dealt with the violation of a mandatory notice ordinance; neither case supports the district court's judgment that Mr. McCowin had no right to a non-deceptive hearing notice notwithstanding Ordinance 21A.10.020.

ARGUMENT

I. MR. McCOWIN HAS ALLEGED A VIOLATION OF HIS RIGHT OF NOTICE UNDER THE CITY'S MANDATORY NOTICE ORDINANCE

The City's Ordinance 21A.10.020 mandates that "[p]roviding all of the information necessary for notice of" the November 2 hearing regarding the proposed two-story building "shall be the responsibility of the applicant" – that is, it was the responsibility of Messrs. Rasmussen and Hammond. The ordinance further requires that the hearing notice

> shall be provided . . . to all owners of the land . . . within eighty five feet (85') . . . for alterations and three hundred feet (300') . . . for new construction. . . . The notice for mailing . . . shall state the substance of the application.

Ordinance 21A.10.020 is not discretionary; its notice requirements are imposed with a mandatory "shall."[1] In Springville Citizens v. City of Springville, 1999 UT 25, ¶¶29-30, 979 P.2d 332, the Utah Supreme Court held that a city "is not entitled to disregard its mandatory ordinances," and that "the substantial compliance doctrine" does not apply to "expressly mandatory" ordinances.

Mr. McCowin alleged in his Complaint that the City and Messrs. Rasmussen and Hammond violated Ordinance 21A.10.020 by failing to disclose the "substance" of the proposed two-story building, and instead sending out a materially deceptive hearing notice. (R. at 2-4)[2] This deceptive notice violated not only Ordinance 21A.10.020, but also the fundamental purpose of a hearing notice – to " adequately inform[] the parties of the specific issues they must prepare to meet." Nelson v. Jacobsen, 669 P.2d 1207, 1213 (Utah 1983) (quoting State v. Gibbs, 500 P.2d 209, 215 (Idaho 1972)).[3] There is authority from other jurisdictions supporting an argument that the City's failure to "comply with the statutory notice requirement deprived it of jurisdiction

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[1]See Salt Lake City Ordinance 21A.04.020.E: "The word 'shall' is mandatory; the word 'may' is permissive."

[2]The hearing notice stated that only a "garage" was proposed. (R. at 6) Mr. McCowin alleged that the two-story building proposed by Messrs. Rasmussen and Hammond was in fact substantially more than a "garage" as that term is defined by Ordinance 21A.62.040. (R. at 2-4) Mr. McCowin also presented evidence that Messrs. Rasmussen and Hammond had refused to allow discovery regarding the non-"garage" character of their building. (R. at 395)

[3]See also Grindstone Butte Mut. Canal v. Idaho Power Co., 574 P.2d 902, 907 (Idaho 1978) ("Notice is rightfully considered to be a critical aspect of due process to be afforded in any administrative process. . . . Appurtenant to the right to notice is the right to be fairly notified as to the issues to be considered."); Drum v. Fresno County Dept. Public Works, 192 Cal. Rptr. 782, 786 (App. 1983) ("Wholly inaccurate notice is no notice at all.").

and rendered invalid its decision to" approve the two-story building. Walkingstick v. Bd. of Adjustment of Tulsa, 706 P.2d 899, 903 (Okl. 1985).[4]

The trial court noted that the evidence raised "serious concerns regarding the adequacy of the 'notice' provided" in this case (R. at 550-51), but never decided whether, as a matter of fact, the notice was sufficiently deceptive to violate Ordinance 21A.10.020. Instead, the court held that "prior to reaching this issue, the Court must determine that [Mr. McCowin] had a protectable property right for purposes of constitutional due process." (R. at 551) The court then held that because the City had some degree of discretion in whether to approve the two-story building, Mr. McCowin had no protectable property interest in the outcome of the November 2 hearing, and therefore no right to receive a non-deceptive notice of that hearing. (R. at 551-52)

The trial court erred by ignoring Ordinance 21A.10.020, which granted a right of notice to all adjacent property owners regardless of whether their "protectable property right[s]" were at stake in the hearing. It is true, of course, that if the November 2 hearing involved a taking of property from Mr. McCowin, then even without Ordinance 21A.10.020 he would have had a *constitutional* due process right to a non-deceptive hearing notice.[5] However, as this Court held

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[4]See also 8A Eugene McQuillin, The Law of Municipal Corporations §25.261, at 388-89 (3rd ed. 2003) ("Indeed, notice complying with statutory and ordinance requirements may be jurisdictional, so that a hearing and decision by a zoning board without timely and proper notice are void and of no effect."); 4 Kenneth H. Young, Anderson's American Law of Zoning § 22.17, at 48049 (4th ed. 1996) ("The requirement that board action be preceded by notice and hearing is jurisdictional. . . . The requirement of notice is satisfied only if the notice affords to parties and other interested persons an adequate opportunity to prepare as well as to attend. . . . Where notice to certain property owners is required by law, failure to give timely notice to such owners invalidates the action of the board.").

[5]Hansen v. Eyre, 2005 UT 29, ¶10, 116 P.2d 290 ("The Fourteenth Amendment to the United States Constitution guarantees that no person shall be deprived of liberty or property without due process of law. U.S. Const. amend. XIV. In order for this guarantee to be

in West Valley City v. Roberts, 1999 UT App 358, ¶8, 993 P.2d 252,

> Both the United States Constitution and the Utah Constitution guarantee due process of law in governmental actions in which life, liberty, or property may be at risk. However, we need not reach this constitutional level of analysis here because procedural due process is guaranteed to the appellants by the [municipality's] City Code.

Unlike the constitutional rights under the due process clause, the right to a hearing notice mandated by Ordinance 21A.10.020 did not depend upon the existence of any protectable property right. Therefore, regardless of whether Mr. McCowin "had a protectable property right for purposes of constitutional due process" (R. at 551), the trial court erred in holding that as a matter of law Ordinance 21A.10.020 did not give Mr. McCowin any right to a non-deceptive hearing notice.[6]

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implicated, however, a petitioner must raise a claim to some viable liberty or property interest of which he is being deprived."); Nelson v. Jacobsen, 669 P.2d 1207, 1213 (Utah 1983) ("To satisfy an essential requisite of procedural due process, a 'hearing' must be prefaced by timely notice which adequately informs the parties of the specific issues they must prepare to meet.") *quoting* State v. Gibbs, 500 P.2d 209 (Idaho 1972).

[6]The trial court's holding is also inconsistent with the holding of the Utah Supreme Court in Morris v. Public Service Commission, 321 P.2d 644, 646 (Utah 1958), that "it is axiomatic that the order of an administrative body issued without notice to affected individuals is violative of due process." See also Traylor Bros., Inc./Frunin-Colnon v. Overton, 736 P.2d 1048, 1050 (Utah App. 1987) ("orders of administrative agencies issued without notice to affected individuals violate due process"). These holdings suggest that under Utah law the due process right to notice of an administrative hearing does not depend upon the existence of a "property" interest, but is extended to any "affected" person.

The trial court also ignored the substantial legal constraints on the City's discretion to approve the two-story building. Ordinance 21A.34.020H.H.1 mandates that the City "shall" only approve buildings that meet certain explicit criteria of architectural compatibility within the University Historic District. Mr. McCowin alleged that the two-story building violated this architectural compatibility constraint. (R. at 3) Mr. McCowin submits that he had more than a "unilateral expectation," Patterson v. American Fork City, 2003 UT 7 ¶23, 67 P.3d 466, that the City would comply with these mandatory ordinances.

For purposes of this appeal, however, there does not presently seem to be a need to address either of these issues. All that is required is the enforcement of the mandatory terms of

II. THE CASE LAW RELIED ON BY THE TRIAL COURT IS INAPPOSITE

On page 5 of its Memorandum Decision (R. at 551), the district court cited Patterson v. American Fork City, 2003 UT 7, 67 P.3d 466, a case in which real estate developers claimed that a city's unfavorable zoning decision had deprived them of "substantive due process." The Utah Supreme Court held that,

> To state a cognizable substantive due process claim, [plaintiffs] must first allege sufficient facts to show a property or liberty interest warranting due process protection.

2003 UT 7, ¶23, *quoting* Crider v. Bd. of County Comm'rs, 246 F.3d 1285, 1289 (10th Cir. 2001). The Patterson court held that the developers' "unilateral expectation" of a favorable zoning decision was not a property interest protected by substantive due process. 2003 UT 7, ¶¶24-27.

Because Ordinance 21A.10.020 creates a right to a non-deceptive hearing notice independently of constitutional due process, Patterson is inapposite. As discussed above, Ordinance 21A.10.020 mandated notice to adjacent property owners whether or not they had a constitutionally protected property interest at stake in the hearing.

On pages 5 and 6 of its Memorandum Decision (R. at 551-52) the district court quoted from Gagliardi v. Village of Pawling, 18 F.3d 188 (2d Cir. 1994), a case in which homeowners claimed that a municipality failed to give them notice of a zoning proceeding regarding an adjacent industrial facility, and that this lack of notice amounted to a denial of procedural due process. At first blush, Gagliardi seems on point. However, in Gagliardi there is no mention of a

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Ordinance 21A.10.020.

municipal notice ordinance. The homeowners in Gagliardi apparently attempted to imply a right of notice from constitutional due process principles – arguing that they had a property interest in the municipality's enforcement of its zoning code against the adjacent industrial facility, that this property interest merited due process protection, and that due process required a hearing notice. 18 F.3d at 193. The United States Court of Appeals for the Second Circuit rejected this argument, holding that the landowner had no property interest in the enforcement of the zoning code, and

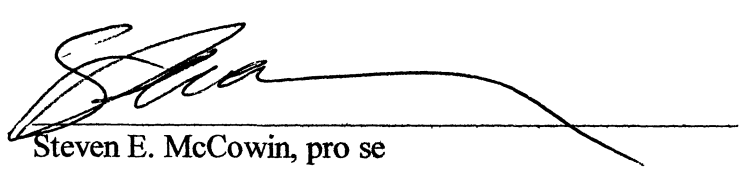
> Since the [homeowners] lack a property interest in the enforcement of the [municipality's] zoning laws, they are unable to state an actionable claim for deprivation of procedural due process.

18 F.3d at 193. As argued above, Mr. McCowin need not leverage a right to notice from constitutional due process principles; he asks only that the mandatory notice requirement of Ordinance 21A.10.020 be enforced. Gagliardi is therefore inapposite.[7]

CONCLUSION

For the reasons discussed above, appellant Steven McCowin respectfully asks that the judgment of the district court be reversed, and that this matter be remanded so that the parties can complete discovery regarding disputed matters of fact.

DATED this 14th day of May, 2007.



Steven E. McCowin, pro se

[7]Moreover, the plaintiffs in Gagliardi were bound by New York law, and did not have the benefit of the axiom of Utah law recognized in Morris, 321 P.2d at 646, "that the order of an administrative body issued without notice to affected individuals is violative of due process."

CERTIFICATE OF SERVICE

I hereby certify that I mailed, postage prepaid, two true and correct copies of the foregoing Appellant's Brief on May 14, 2007, to each of the following:

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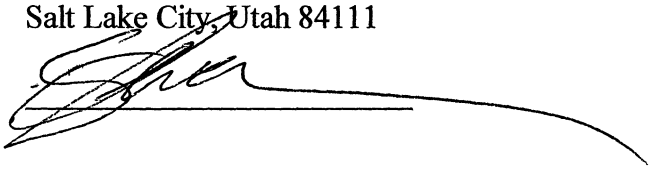

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STEVEN MCCOWIN, Plaintiff, vs. SALT LAKE CITY CORPORATION; BARRY RASMUSSEN; MARK HAMMOND, Defendants.	MEMORANDUM DECISION Case No. 060912420 Honorable GLENN K. IWASAKI October 25, 2006

The above-entitled matter comes before the Court pursuant to Salt Lake City Corporations' Motion to Dismiss, Defendants' Motion to Dismiss or, Alternatively, for Summary Judgment, and Plaintiff's Motion to Advance and Consolidate Trial on Merits with Hearing on Motion for Preliminary Injunction. The Court heard oral argument with respect to the motions on October 23, 2006. Following the hearing, the matters were taken under advisement.

The Court having considered the motions, memoranda, and where applicable, the exhibits attached thereto, hereby enters the following ruling.

This matter comes before the Court the result of the building of a two story structure located at 446 South Douglas Street in Salt Lake City, Utah.

With its motion, Salt Lake City Corporation ("the City") argues Plaintiff's Complaint should be dismissed because it is

untimely, coming more than 30 days after the meeting or action for which the notice was given. *See* Utah Code Ann. § 10-9a-209. Moreover, contends the City, Plaintiff in this case did not file any appeal with the City Land Use Appeals Board and as such, has failed to exhaust his administrative remedies. Finally, asserts the City, Plaintiff's Complaint must be dismissed as he has admits receiving notice of a proposal to construct a garage on the neighboring property and has failed to demonstrate any deficiency in that notice.

Plaintiff opposes the motion arguing the City had an obligation to provide notice of the "substance" of the building and in this case, the hearing notice falsely represented that the proposed building was a "garage." According to Plaintiff, he relied upon the City's representation what only a "garage" was proposed when, in fact, it was a two-story building that would be the final product. Indeed, asserts Plaintiff, it was because of this representation that he did not attend the hearing. As a matter of law, contends Plaintiff, the hearing notice's use of the word "garage" failed to give adequate notice of the substance of the proposed building.

In light of the facts of this case, it is Plaintiff's position an exception to the requirement that administrative

remedies be exhausted should be instituted and the equitable discovery rule should be enforced to toll the limitations period.

Defendants Barry Rasmussen and Mark Hammond join in the arguments posed by the City with respect to dismissal of this matter. Specifically, argue Defendants, Plaintiff has no protectable property interest, the notice was adequate, and the Commission complied with City ordinances.

Alternatively, Defendants contend summary judgment is appropriate as Plaintiff's claims are barred by the applicable statute of limitations (which provide that any person adversely affected by a final land use decision has thirty days within which to file a petition for review in district court or such petition is barred). *See* Utah Code Ann. § 10-9a-(2) &(6)). Moreover, argue Defendants, regardless of whether the Commission violated any ordinance, the undisputed record demonstrates the Commission's decision would have been the same, hence, Plaintiff has suffered no prejudice. Finally, assert Defendants, Plaintiff is not entitled to a permanent injunction as a matter of law because he cannot establish special damages. Indeed, argue Defendants, any damages suffered by Plaintiff are shared by every landowner who lives in the University Historic District.

Plaintiff in opposition argues Defendants' motion for

summary judgment is premature. Moreover, contends Plaintiff, the two-story building's incompatibility with and injury to the University Historic District is, at the very least, a disputed issue. Additionally, asserts Plaintiff, he was entitled to a hearing notice accurately disclosing the substance of Defendants' proposed building. Indeed, argues Plaintiff, the City's ordinances mandate such a notice and this mandate was violated by the misleading notice that was sent. Further, contends Plaintiff, Defendants have repeatedly initiated and threatened to initiate, legal proceedings against conditions they dislike on their neighbors' property.

It is Plaintiff's position Defendants' two-story building is not a garage, the Notice was legally deficient and, the City violated a number of its ordinances.

Further, argues Plaintiff, as argued above, the equitable discovery rule tolls the limitations period.

Finally, Plaintiff contends he has suffered special damages over and above those suffered by the District generally. Indeed, argues Plaintiff, because of the proximity of the building to his property, it intrudes into his light and air in a way not shared by the general public.

After reviewing the record in this matter and although the

Court has some serious concerns regarding the adequacy of the "notice" provided Plaintiff in this case, prior to reaching this issue, the Court must determine that Plaintiff had a protectable property right for purposes of constitutional due process.

For his part, Plaintiff asserts the City's ordinances and/or the public hearing requirement create such a right and give him something in the nature of a property interest. This said, however, a legitimate claim of entitlement requires explicit rules creating the right and, if a city has discretion in applying the rules, there is no legitimate claim of entitlement. *See* Patterson v. American Fork City, 67 P.3d 466, 473 (Utah 2003). Indeed, in *Gagliardi v. Village of Pawling*, 18 F.3d 188 (2d Cir. 1994), the Second Circuit elaborated stating:

> Where a local regulator has discretion with regard to the benefit at issue, there normally is no entitlement to that benefit. An entitlement to a benefit arises "only when the discretion of the issuing agency is so narrowly circumscribed" as to virtually assure conferral of the benefit. The issue of whether an individual has such a property interest is a question of law "since the entitlement analysis focuses on the degree of official discretion and not on the probability of its favorable exercise."

Id. at 192. (Internal citations omitted).

While Plaintiff has cited several ordinances, he has pointed to nothing in those ordinances which purports to limit the City's

discretion in approving new structures in the University Historic District. Furthermore, the "deprivation of a procedural right to be heard . . . is not actionable when there is no protected right at stake." *Id.* at 193.

Based upon the forgoing, the Court finds Plaintiff's Complaint fails to state a claim upon which relief can be granted. Accordingly, the same is dismissed. In light of this ruling, the Court does not reach Plaintiff's Motion to Advance and Consolidate Trial on Merits with Hearing on Motion for Preliminary Injunction.

DATED this 30 day of October, 2006.

GLENN K. IWASAKI
DISTRICT COURT JUDGE